Yeap Boon Hai v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–53 OF 2001
LOW HOP BING, ABDULL HAMID EMBONG AND VINCENT NG JJCA
3 APRIL 2009

Criminal Law — Penal Code — s 302 — Murder — Conviction and sentence, appeal against — Issue of evidence — Cumulative effect of circumstantial evidence — Whether evidence adduced at trial justified conviction for murder — Whether case proven beyond reasonable doubt — Whether accused correctly convicted and sentenced

Criminal Procedure — Trial — Defence — Explanation of accused — Denial — Whether explanation coherent and consistent

Evidence — Circumstantial evidence — Inference from facts — Whether circumstantial evidence relied sufficient to convict — Prima facie case, whether proven — Whether independent evidence to connect accused with crime established

The appellant ('the accused') was charged with six counts of murder by causing the death of six persons, who were immediate relatives of the accused, an offence under s 302 of the Penal Code. The Shah Alam High Court found the accused guilty, convicted and sentenced him to death on all six charges. Dissatisfied with the conviction and sentence, the accused appealed. It was contended on behalf of the accused that the circumstantial evidence on which the prosecution had relied on was insufficient to convict the accused. It was argued, inter alia, that the learned trial judge had failed to consider: (1) the failure of the chemist, SP6, to ascertain the age of the petrol, the cause of the fire, or the origin of the broken glasses; (2) the failure to lift fingerprints from the plastic containers which SP9 testified was filled with petrol, as the fingerprints were of great significance; and (3) the contradictions in SP15's evidence under cross-examination and re-examination.

Held, dismissing the appeal:

(1) The evidence indicated that the petrol station attendant, SP9, had sold

A the petrol to the accused who had used four empty plastic containers to carry it. Further, SP9 had sent the accused to the accused's car by using his motorcycle. The accused had also placed the two petrol containers in the basket of the motorcycle and carried two in his hands. To say the least, SP9's direct and uncontroverted evidence had, without a doubt, B established the identity of the accused. Hence, the lifting of the accused's fingerprints from the four plastic containers would assume little value or significance (see para 27).

(2) The learned trial judge had specifically accepted SP15's evidence that C the fire was caused by inflammable substances such as petrol which had seeped through the staircase of the shophouse. This court was of the view that no hard and fast rule can be laid down for determining the credibility or otherwise of a witness. It is only when a witness gives or makes two statements which differ in material particulars that there is D ground for believing that he is not a truthful witness (see para 28).

(3) In the instant appeal, the court was unable to identify any contradiction in SP15's evidence. The learned trial judge has had the audio visual advantage. He was entitled to accept the evidence of SP15 as credible. As a matter of fact, SP15's evidence that the six victims died as the E direct result of the fire was consistent with and corroborated by the medical findings of the pathologist, SP8, who confirmed that smoke inhalation was the cause of death and the fact that the fire was caused by the petrol was corroborated by the evidence of the petrol station attendant, SP9, who had sold the petrol to the accused. There was no F plausible reason for a public officer such as SP15 to lie in court and risk perjury, particularly in a trial involving capital punishment (see paras 15 & 29).

(4) The setting of fire by the accused to the shophouse by means of petrol G clearly brought about an enormous degree of risk to the lives of the occupants therein. The death caused thereby was not just a likely result. It was certainly the most probable result. It was therefore murder (see para 43).

H **[Bahasa Malaysia summary**

Perayu ('tertuduh') dituduh dengan enam tuduhan membunuh dengan menyebabkan kematian enam orang, yang merupakan saudara-mara terdekat tertuduh, satu kesalahan di bawah s 302 Kanun Keseksaan. Mahkamah I Tinggi Shah Alam mendapati tertuduh bersalah, mensabitkan dan menjatuhkan hukuman mati ke atas keenam-enam tuduhan. Tidak berpuas hati dengan sabitan dan hukuman, tertuduh merayu. Dihujahkan bagi pihak tertuduh bahawa keterangan ikut keadaan yang disandarkan oleh pihak pendakwaan tidak mencukupi untuk menyabitkan tertuduh. Ia juga

dipertikaikan, antara lain, bahawa hakim perbicaraan yang bijaksana gagal untuk mempertimbangkan: (1) kegagalan ahli kimia, SP6, untuk memastikan selangan masa petrol, punca kebakaran, atau punca kaca pecah; (2) kegagalan untuk mengambil cap jari daripada bekas plastik yang diisi dengan petrol daripada keterangan SP9, memandangkan cap jari tersebut amat penting; dan (3) percanggahan dalam keterangan SP15 dalam pemeriksaan balas dan pemeriksaan semula.

Diputuskan, menolak rayuan:

(1) Keterangan menunjukkan bahawa atendan stesen petrol, SP9, telah menjual petrol kepada tertuduh yang menggunakan empat bekas plastik untuk membawanya. Selanjutnya, SP9 telah menghantar tertuduh ke kereta tertuduh dengan menggunakan motorsikalnya. Tertuduh juga telah meletakkan dua bekas petrol ke dalam bakul motorsikal dan membawa dua lagi bekas di tangannya. Dikatakan, keterangan SP9 yang terus dan tidak bercanggah telah, tanpa sebarang keraguan, membuktikan identiti tertuduh. Oleh itu, memindahkan cap jari tertuduh daripada keempat-empat bekas plastik hanya memberikan nilai atau kepentingan yang sedikit (lihat perenggan 27).

(2) Hakim perbicaraan yang bijaksana telah secara spesifik menerima keterangan SP15 bahawa kebakaran tersebut berpunca daripada bahan-bahan mudah terbakar seperti petrol yang telah meresapi tangga rumah kedai tersebut. Mahkamah ini berpendapat bahawa tiada peraturan ketat dan cepat yang dinyatakan untuk menentukan kredibiliti seorang saksi. Hanya apabila saksi memberikan atau membuat dua kenyataan yang berlainan dalam maklumat material maka terdapat asas untuk mempercayai bahawa dia bukannya saksi yang boleh dipercayai (lihat perenggan 28).

(3) Dalam kes rayuan ini, mahkamah tidak dapat mengenalpasti sebarang percanggahan dalam keterangan SP15. Hakim perbicaraan yang bijaksana mendapat kelebihan pandang dengar. Dia berhak untuk menerima keterangan SP15 sebagai boleh dipercayai. Lebih-lebih lagi, keterangan SP15 bahawa keenam-enam mangsa telah meninggal dunia diakibatkan secara langsung oleh kebakaran tersebut adalah konsisten dan disokong oleh penemuan perubatan ahli patologi, SP8, yang mengesahkan bahawa penyedutan asap merupakan punca kematian dan fakta bahawa kebakaran tersebut disebabkan oleh petrol disokong oleh keterangan atendan stesen petrol, SP9, yang telah menjual petrol kepada tertuduh. Tiada sebab yang munasabah bagi seorang pegawai awam seperti SP15 untuk menipu di mahkamah dan menanggung risiko sumpah bohong, terutamanya dalam satu perbicaraan yang melibatkan hukuman mati (lihat perenggan 15 & 29).

A (4) Kebakaran yang diakibatkan terhadap rumah kedai tersebut menggunakan petrol oleh tertuduh, secara jelasnya membawa risiko yang tinggi kepada nyawa penghuninya. Oleh itu kematian yang disebabkan bukanlah satu kemungkinan. Ia sememangnya sesuatu yang akan berlaku. Oleh itu ia merupakan satu pembunuhan (lihat
B perenggan 43).]

Notes

For cases on defence against murder, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4729–4735.

C For cases on inferences from facts, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 629–631.

For cases on s 302 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1237–1238.

D **Cases referred to**

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209, FC (refd)
Chan Chwen Kong v PP [1962] MLJ 307, CA (refd)
Chang Kim Siong v PP [1968] 1 MLJ 36, FC (refd)
Chu Tak Fai v PP [1998] 4 MLJ 246; [1998] 4 CLJ 789, CA (refd)
E *Chung Kum Moey v PP* [1967] 1 MLJ 205, PC (refd)
Dennis Lani ak Mat v PP [2001] 4 MLJ 609; [2001] 4 CLJ 707, CA (refd)
Eng Sin v PP [1974] 2 MLJ 168, FC (refd)
Hyam v Director of Prosecutions [1975] AC 55, HL (refd)
Idris v PP [1960] MLJ 296, CA (refd)
F *Jayaraman & Ors v PP* [1982] 2 MLJ 306, FC (refd)
Kamis v PP [1975] 1 MLJ 46, FC (refd)
Karam Singh v PP [1967] 2 MLJ 25, FC (refd)
Kartar Singh & Anor v PP [1952] MLJ 85, CA (refd)
Krishnan & Anor v PP [1981] 2 MLJ 121, FC (refd)
G *Law Tim Wah v PP* [1978] 1 MLJ 167, FC (refd)
Lim Foo Yong v PP [1976] 2 MLJ 259, HC (refd)
McGreevy v DPP [1973] 1 WLR 276; [1973] 1 All ER 503, HL (refd)
Mohamed bin Kasdi v PP [1969] 1 MLJ 135, HC (refd)
Muniandy v PP [1973] 1 MLJ 79, FC (refd)
H *PP v David Ackowuah Bonsu* [1998] 7 MLJ 451; [1999] 2 CLJ 677, HC (refd)
PP v Ku Lip See [1981] 1 MLJ 258, HC (refd)
PP v Lee Eng Kooi [1993] 2 MLJ 322, HC (refd)
PP v Lin Lian Chen [1992] 2 MLJ 561; [1992] 1 CLJ 285, SC (refd)
I *PP v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560, FC (refd)
PP v Wan Razali Kassim [1970] 2 MLJ 79, FC (refd)
State of Assam v Muhim Berkataki & Anor AIR 1987 SC 98 (refd)
Sunny Ang v PP [1966] 2 MLJ 195, FC (refd)
Tham Kai Yau & Ors v PP [1977] 1 MLJ 174, FC (refd)

Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

Legislation referred to

Penal Code ss 34, 299, 300, 302
Penal Code [IND] ss 34, 302
Penal Code [SG] ss 299, 300

Mohd Firuz Jaffril (Mahadi Abd Jumaat with him) (Firuz Jaffril, Aidil & Zarina) for the appellant.
Abdul Razak Musa (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

Low Hop Bing JCA (delivering judgment of the court):

APPEAL

[1] The appellant ('the accused') was charged with six counts of murder, by causing the death of six persons on 14 April 1997, at about 3.50am in a shophouse at No 450A, Jalan 18/2A, Taman Seri Serdang ('the shophouse'), Hulu Langat, Selangor Darul Ehsan, punishable under s 302 of the Penal Code (unless otherwise stated, a reference hereinafter to a section is a reference to that section in the Penal Code).

[2] After a full trial, the Shah Alam High Court found the accused guilty, convicted and sentenced him to death on all the six charges.

[3] On 10 December 2008, we dismissed the accused's appeal, and affirmed the convictions and sentences. We now give our grounds.

FINDING OF FACTS

[4] The narrative of facts as found by the trial court unfolds a gruesome scenario which mirrors an unmitigated disregard for the lives of fellow human beings, more specifically, the immediate relatives of the accused. Six precious lives were ruthlessly wiped out. The victims are:

(1) Koh Seik Lang, the accused's mother-in-law (in the first charge);

(2) Khor Chai Peng, the accused's maternal uncle (in the second charge);

(3) Kee Sok Kiang, the accused's wife (in the third charge);

(4) Khor Khim Im, the accused's nephew-in-law (in the fourth charge);

(5) Kee Kim Hup, the accused's brother-in-law (in the fifth charge); and

(6) Yeap Cheok Wai, the accused's son (in the sixth charge).

A **[5]** On 14 April 1997, at about 3.50am, the shophouse was gutted by fire and six victims, who were in blazes, were burnt to death. While it is true that there was no eye-witness to bear testimony to the person who has set fire to the shophouse, there was other credible and reliable evidence for the trial court to consider.

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[6] SP7, a nurse attached to the Kajang Hospital, was staying in her house opposite the shophouse. At about 3am on 14 April 1997, she switched on the light of her toilet, which was facing the shophouse, in order to answer the call of nature. She saw the accused some three to four metres away. The accused C was seen fleeing and descending hurriedly from the staircase of the shophouse which was already on fire then. SP7 knew the accused as one of the occupants. He always quarrelled with his wife, the late Kee Sok Kiang (the victim in the third charge). The accused's nickname is 'orang gila' ('mad man'). Be it noted that this is merely a nickname and has nothing to do with D the well-known *M'Naghten Rules* (1843) 10 CL & F 200 (HL).

[7] Petrol station attendant ('SP9'), a male Malay, was on duty there from 10.30pm on 13 April 1997 to 7.30am the next day. At 2.30am on 14 April 1997, a male Chinese brought four empty plastic containers to purchase E petrol from SP9. After SP9 has set the petrol computer, the male Chinese filled the containers, each with RM5 of petrol. He gave a RM50 note to SP9 who in return gave him the change of RM30. The male Chinese requested SP9 to send him to his car, which was parked at the Phase 1 Serdang housing estate nearby. SP9 used his motorcycle to send the male Chinese via the F backlane of the shophouse. It was about five minutes by motorcycle from the petrol station. The male Chinese, as pillion rider, placed two of the four containers in the basket of SP9's motorcycle, and carried the other two in his hands. SP9 observed the male Chinese for about 30 minutes. He identified the male Chinese, who has a fair complexion, is thin in stature, about 170cm G tall, bespectacled and speaks Bahasa Malaysia with a Chinese accent. SP9 has positively identified the male Chinese in an identification parade conducted by Inspector Ravinathan a/l Selvarajah (SP21) on 24 April 1997 at 3pm at the Kajang Police Station. SP9 also identified the male Chinese as the accused in court.

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[8] SP12 runs a photocopying business at No 449, Jalan Susur 18/2A, Taman Seri Serdang, next to the shophouse which also has the same business. He corroborated SP7's evidence that the accused and his wife (the victim in I the third charge) had frequently quarrelled. On 14 April 1997, at about 3.30am, he heard a big bang coming from a fast moving car with broken glasses.

[9] SP13 and SP14 are the accused's brother-in-law and sister-in-law respectively. They were staying in the shophouse. They confirmed that on 13 April 1997, in the evening, the accused had a series of quarrels, not only with his wife, but also his mother-in-law (the victim in the first charge), and another brother-in-law, Kee Kim Hup (the victim in the fifth charge).

[10] The quarrel between the accused and his wife arose from the wife's request for divorce. The accused was furious when his wife chased him out of the shophouse, which she claimed was hers. The accused had also claimed ownership of the shophouse, and threatened to make his brother-in-law, Kee Kim Hup, a bankrupt. The accused refused to leave the shophouse as he wanted to see his children there. The quarrel was witnessed by SP13 and SP14. It was also witnessed by the accused's mother, two elder sisters and younger brother, all of whom left the shophouse subsequently at 12 midnight. The accused stayed back to watch video at the back portion of the shophouse.

[11] Mr Lim Kieng Chwee, the government chemist ('SP6') received several exhibits, including a white plastic container with a cover, from detective l/cpl Wong Chee Meng ('SP18'). The chemist found 280ml of black liquid with pinkish tint. Upon analysis, he confirmed that the liquid was petrol which, being exposed, had extensively evaporated. The liquid contained carbon particles.

[12] SP15, the operations officer of the Fire Services Department, who headed the operations to put off the fire, testified that the fire was caused by inflammable substances such as petrol which had seeped through the staircase to the bottom, and facilitated the spread of the fire.

[13] The officer in charge of the Serdang Police Station ('SP20') sent the victims' bodies to the Kajang Hospital for post-mortem.

[14] The medical assistant (SP5) received the victims' bodies while the accused's brother-in-law (SP13) identified them for post-mortem.

[15] The pathologist (SP8) who conducted the post-mortem testified that all the six victims had been positively identified. His finding was that their respective organs showed signs of soot, thereby confirming that smoke inhalation was the cause of death.

[16] In the defence case, the accused had largely confirmed the evidence adduced for the prosecution including his quarrels with his wife, mother-in-law and brother-in-law, all of whom were victims in the fire. However, according to the accused, he went to the shophouse with his

A Indonesian employee by the name of Yu, to whom he had given RM50 to buy food, as Yu was hungry. The accused told Yu not to return to the shophouse as the accused had quarrelled with his wife. The accused then suddenly remembered that his car has run out of petrol. Subsequently, together with Yu, he went to the petrol station. The accused asked Yu to fill the car with
B petrol, and to use the petrol to destroy the photocopying machines in the shophouse. Yu then drove the accused in the accused's car to the shophouse. Yu told the accused that he (Yu) had poured some of the petrol to set fire to the photocopying machines in the shophouse. At the 14th Milestone, Jalan Puchong Kuala Lumpur, the accused asked Yu to get out of the car. He then
C drove himself to the 7-Eleven convenience store in Subang Jaya and bought 100 tablets of Panadol, two cans of beer and a can of Guiness Stout. The accused then returned to his own house in Shah Alam where he washed down 30 tablets of Panadol with the beer. He was rendered unconscious. He regained consciousness the next day when his sister and elder brother came
D to inform him of the fire to the shophouse in which his son (the victim in the sixth charge) was burnt to death. When his sister showed him the newspapers which carried the fire episode, he said he wanted to surrender himself to the police. Apart from asking Yu to destroy the photocopying machines, the accused denied having asked Yu to set fire to the shophouse.

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[17] The accused did not return to the shophouse to ask what had happened to his wife and children there. He also did not make a police report on Yu's act of setting fire to the photocopying machines in the shophouse. The accused did not even inform the investigating officer of Yu's existence at
F all.

CIRCUMSTANTIAL EVIDENCE

[18] In submitting that the circumstantial evidence on which the
G prosecution had relied is insufficient to convict the accused, learned counsel Mr Mohd Firuz Jaffril (assisted by Mr Mahadi Abd Jumaat) complained that the learned trial judge had failed to consider:

(1) The failure of the chemist ('SP6') to ascertain the age of the petrol, the
H cause of the fire, or the origin of the broken glasses;

(2) The failure to lift fingerprints from the plastic containers which SP9 testified was filled with petrol, as the fingerprints were of great significance, on the authority of *Public Prosecutor v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560 (FC); and

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(3) The contradictions in SP15's evidence under cross-examination and re-examination, citing *Mohamed bin Kasdi v Public Prosecutor* [1969] 1 MLJ 135 (HC) and *Public Prosecutor v Lee Eng Kooi* [1993] 2 MLJ 322 (HC).

[19] Learned deputy public prosecutor, Mr Abdul Razak Musa supported the learned trial judge's finding of facts, more specifically the roles played by the accused. He added that by circumstantial evidence, the prosecution has proved beyond reasonable doubt that the accused was the person who has intentionally caused the death of the six victims. The authorities which the prosecution relied on are:

(1) *Public Prosecutor v Wan Razali Kassim* [1970] 2 MLJ 79 (FC);

(2) *Krishnan & Anor v Public Prosecutor* [1981] 2 MLJ 121 (FC);

(3) *Law Tim Wah v Public Prosecutor* [1978] 1 MLJ 167 (FC);

(4) *Chan Chwen Kong v Public Prosecutor* [1962] 28 MLJ 307 (CA);

(5) *Public Prosecutor v David Ackowuah Bonsu* [1998] 7 MLJ 451; [1999] 2 CLJ 677 (HC);

(6) *Dennis Lani ak Mat v Public Prosecutor* [2001] 4 MLJ 609; [2001] 4 CLJ 707 (CA); and

(7) *Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195 (FC).

[20] Under this head, the question that calls for determination is:

> On the entire evidence, including the circumstantial evidence adduced at the trial, has the prosecution established all six charges against the accused beyond reasonable doubt?

[21] We note that the principles governing circumstantial evidence have been authoritatively considered in *Jayaraman & Ors v Public Prosecutor* [1982] 2 MLJ 306, where the Federal Court was requested to answer the following question:

> Whether it is correct law that in dealing with a case which relies on circumstantial evidence it does not make any difference if a court finds that in considering all the evidence it is satisfied beyond reasonable doubt that the accused is guilty of the offence or if the court says that the evidence points only to the irresistible conclusion that the accused is guilty.

[22] In delivering the judgment for the Federal Court, Suffian LP (as he then was) referred to *McGreevy v DPP* [1973] 1 WLR 276; [1973] 1 All ER 503 (HL) and admirably analysed several local cases viz:

(1) *Kartar Singh & Anor v Public Prosecutor* [1952] MLJ 85 (CCA Singapore);

(2) *Idris v Public Prosecutor* [1960] MLJ 296 (CA);

(3) *Chan Chwen Kong*;

(4) *Sunny Ang*;

(5) *Karam Singh v Public Prosecutor* [1967] 2 MLJ 25 (FC);

(6) *Chang Kim Siong v Public Prosecutor* [1968] 1 MLJ 36 (FC);

(7) *Muniandy v Public Prosecutor* [1973] 1 MLJ 79 (FC);

(8) *Eng Sin v Public Prosecutor* [1974] 2 MLJ 168 (FC);

(9) *Kamis v Public Prosecutor* [1975] 1 MLJ 46 (FC); and

(10) *Lim Foo Yong v Public Prosecutor* [1976] 2 MLJ 259 (HC) (collectively 'the local cases').

[23] The learned Lord President:

(1) applied *McGreevy*, where the House of Lords held that in a jury trial, it is the duty of the judge to make clear to the jury in terms which are adequate to cover the particular features of the case that they must not convict unless they are satisfied beyond reasonable doubt of the guilt of the accused; and there is no rule that, where the prosecution case is based on circumstantial evidence, the judge must, as a matter of law, give a further direction that the facts proved are not only consistent with the guilt of the accused, but also such as to be inconsistent with any other reasonable conclusion;

(2) modified the ruling (in the local cases) which seems to lay a heavier burden of proof on the prosecution where it depends on circumstantial evidence than where it depends on direct evidence;

(3) explained that the irresistible conclusion test only seems to place on the prosecution a higher burden of proof than in a case where it depends on direct evidence, for in fact to apply the irresistible conclusion test is another way of saying that the prosecution must prove the guilt of the accused beyond reasonable doubt; and

(4) held that in a case tried without a jury and depending on circumstantial evidence, it is enough for the trial judge to remember only that the prosecution need prove its case beyond reasonable doubt, and failure by him to also say that the circumstances are not only consistent with the accused having committed the crime but also such that they are inconsistent with any other reasonable explanation, is not fatal. In other words, in a case depending on circumstantial evidence, it is enough if the court merely says that it is satisfied of the accused's guilt beyond reasonable doubt, without further saying that the facts proved irresistibly point to one and only one conclusion, namely the accused's guilt.

[24] To answer the above question, we would refer generally to the learned trial judge's finding of facts and specifically to the following:

(1) The accused's quarrel with his late wife who had wanted to divorce him prior to the fire;

(2) The accused's quarrel with his mother-in-law (the victim in the first charge), and his brother-in-law (Kee Kim Hup (the victim in the fifth charge) in connection with the ownership of the shophouse and the photocopying business therein;

(3) The accused's threat to make Kee Kim Hup a bankrupt;

(4) Before the fire, the accused had purchased RM20 of petrol which was packed in four plastic containers;

(5) The accused was seen fleeing and descending hurriedly from the staircase of the shophouse when the fire started to spread;

(6) The accused was nowhere to be seen at the time of putting off the fire at the scene or at any time subsequently;

(7) The accused had been positively identified at the identification parade and in the court as the person who singularly played the above roles which led to the fire; and

(8) The non-existence of the Indonesian employee, Yu, to whom the accused had purportedly attributed the setting of the fire to the photocopying machines in the shophouse, by means of the petrol.

[25] The evidence of the operations officer of the Fire Services Department ('SP15'), that the fire was caused by petrol, an inflammable substance, which had seeped through the staircase to the bottom and facilitated the spread of the fire, has negated or rebutted the defence submission relating to SP6's failure to ascertain the cause of fire, the age of the petrol, or the origin of the broken glasses.

[26] Next, the lifting of fingerprints. In *Mansor bin Mohd Rashid & Anor*, the Federal Court, speaking through Chong Siew Fai (CJ (Sabah and Sarawak)) (as he then was), held that:

(1) Where the identity of a culprit is in question or required to be proved, fingerprint evidence would be of great significance and immense value;

(2) However, where there is evidence indicating the identities of the alleged offenders and the sale transaction, the lifting of fingerprints assumed little value or significance.

A **[27]** The evidence in the mainstream of the instant appeal indicated that the petrol station attendant ('SP9') had sold RM20 of petrol to the accused who had used four empty plastic containers to carry it. There was exchange of money between SP9 and the accused for the sale and purchase of the petrol. This is further strengthened by SP9's evidence that he has sent the B accused to the accused's car by using SP9's motorcycle, and also the placement of the petrol containers in the basket of the SP9's motorcycle and in the accused's hands. To say the least, SP9's direct and uncontroverted evidence has, without a doubt, established the identity of the accused. Hence, the lifting of the accused's fingerprints from the four plastic containers would C assume little value or significance.

[28] The challenge by the defence to the credibility of SP15, seemingly on the contradictions in his evidence under cross-examination and D re-examination, must now be examined. The learned trial judge had specifically accepted SP15's evidence that the fire was caused by inflammable substances such as petrol which has seeped through the staircase of the shophouse. We are of the view that no hard and fast rule can be laid down for determining the credibility or otherwise of a witness. It is only when a E witness gives or makes two statements which differ in material particulars that there is ground for believing that he is not a truthful witness: per Ali J (as he then was) in *Mohamed Kasdi*. Hence, if in a case the prosecution leads two sets of evidence, each one of which contradicts and strikes at the other and shows it to be unreliable, then the court would be left with no reliable and F trustworthy evidence upon which the conviction of the accused might be based, as inevitably the accused would have the benefit of such a situation: per Vincent Ng JC (now JCA) in *Lee Eng Kooi*.

[29] In the instant appeal, we are unable to identify any contradiction in G SP15's evidence. The learned trial judge has had the audio visual advantage. He is entitled to accept the evidence of SP15 as credible. As a matter of fact, SP15's evidence that the six victims died as the direct result of the fire is consistent with and corroborated by the medical findings of the pathologist ('SP8') that the six victims' respective organs showed signs of soot, thereby H confirming that smoke inhalation was the cause of death and the fact that the fire was caused by the petrol was corroborated by the evidence of the petrol station attendant ('SP9') who had sold the petrol to the accused. There is no plausible reason for a public officer such as SP15 to lie in court and risk perjury, particularly in a trial involving capital punishment: see eg *Public* I *Prosecutor v David Ackowuah Bonsu* [1998] 7 MLJ 451; [1999] 2 CLJ 677 (HC) per Hishamudin Yunus J.

[30] The learned trial judge has made a finding of facts based on actual evidence, which finding of fact is corroborated in material particulars by

inferences reasonably and properly drawn from other evidence adduced before him. The finding is not against the weight of evidence. Sitting in the appellate court, we should be slow to interfere with the finding of facts by the trial court as we do not have the advantage of seeing and hearing the witnesses and therefore of assessing their credibililty: see eg *Wan Razali Kassim, Krishnan & Anor* and *Lim Tim Wah*.

[31] Now, we shall consider the defence case. The accused's failure to raise the issue relating to the existence of Yu, by way of cross-examination of prosecution witnesses on this fact of crucial importance, clearly attracts the application of the well-known general rule enunciated by the Federal Court in the judgment of Raja Azlan Shah CJ (Malaya) (now HRH the Sultan of Perak) in *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212, that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony.

[32] The accused has indeed sprung a surprise on the prosecution in so far as Yu's existence is concerned. The accused took the risk for having kept Yu's existence 'up his sleeve'. This sort of defence has been branded as 'recent invention': see *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561; [1992] 1 CLJ 285 (SC) per Edgar Joseph Jr SCJ (as he then was); *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209 at p 218 C–E, also by His Lordship.

[33] Apparently, the defence case is an outright denial and nothing more. It is of no assistance to the accused: *Public Prosecutor v Ku Lip See* [1981] 1 MLJ 258 (HC) per Yusof Abdul Rashid J (as he then was).

[34] The accused's failure to tell the investigating officer ('SP25') of Yu's existence, but raising it for the first time in the defence case, is an illustration of fabrication and an afterthought: see eg *Chu Tak Fai v Public Prosecutor* [1998] 4 MLJ 246; [1998] 4 CLJ 789 (CA), per Denis Ong JCA.

[35] The learned trial judge has specifically found that Yu had never existed at all; and so has rejected the defence, thereby holding that the prosecution has proved its case beyond all reasonable doubt to warrant the convictions and sentences. The learned judge's careful analysis of the defence case reflects a correct approach and is beyond reproach. The learned trial judge has not misdirected himself. The evidence of the accused who sought to attribute criminal responsibility to his Indonesian employee, Yu, has been properly rejected.

[36] We are of the view that the circumstantial and corroborative evidence is overwhelming. The finding of facts should be endorsed on appeal: see eg

A *Dennis Lani ak Mat*. The answer to the above question under this head is in the affirmative.

MURDER OR CULPABLE HOMICIDE?

B **[37]** The defence advanced an alternative argument that the evidence adduced for the prosecution does not come within the definition of murder in s 300. Instead, it is culpable homicide contained in s 299. Support was sought in:

C (1) *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174 (FC); and

(2) *Chung Kum Moey v Public Prosecutor* [1967] 1 MLJ 205 (PC).

[38] The prosecution took the position that the evidence revealed the offence of murder.

D

[39] The question which requires determination herein is whether the evidence adduced at the trial justifies conviction for murder as defined in s 300.

E

[40] The defence contention calls for an examination of the distinctions between culpable homicide and murder under s 299 and s 300 respectively, These two sections, where relevant, merit reproduction as follows:

F 299 Culpable homicide.

Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

G

300 Murder.

Except in the cases hereinafter excepted, culpable homicide is murder –

H (a) if the act by which the death is caused is done with the intention of causing death;

(b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

I

(c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

(d) if the person committing the act knows that it is so imminently

dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

[41] The Privy Council considered these two sections of the Singapore Penal Code (equipollent to our ss 299 and 300) in *Chung Kum Moey*. Viscount Dilhorne explained, inter alia, as follows:

(1) The four limbs of s 300 were not mutually exclusive; and

(2) The contrast between the use of the words 'likely to cause death' in s 299 and the words 'sufficient in the ordinary course of nature to cause death' in the third limb of s 300 indicated that a high degree of certainty was required to justify a conviction under that limb for murder.

[42] In *Tham Kai Yau*, Raja Azlan Shah FJ (now HRH the Sultan of Perak) delivered the judgment for the Federal Court and discussed in detail the distinctions between the two offences. The essential principles may be extracted as follows:

(1) Whether the offence is culpable homicide or murder depends upon the degree of risk to human life. If death is a likely result, it is culpable homicide; if it is the most probable result, it is murder;

(2) In the last analysis, it is a question of degree of probability; and

(3) All cases falling within s 300 must necessarily fall within s 299, but all cases falling within s 299 do not necessarily fall within s 300.

[43] Applying the above distinctions between ss 299 and 300 to the finding of facts in the court below, we are of the view that the setting of fire by the accused to the shophouse by means of petrol clearly brought about an enormous degree of risk to the lives of the occupants therein. The death caused thereby is not just a likely result. It is certainly the most probable result. It is therefore murder.

[44] The facts of the case and the roles played by the accused have found substantially similar situations in *State of Assam v Muhim Berkataki & Anor* AIR 1987 SC 98; and *Hyam v Director of Prosecutions* [1975] AC 55 (HL), respectively.

[45] In *Muhim Berkataki & Anor*, the accused sprinkled and poured kerosene oil in the deceased's shop as well as on the deceased's person. The deceased's dying declaration implicated the two accused persons as his assailants. There was also reliable evidence of eye-witness. The Supreme

Court of India held that the prosecution had proved the charges under s 302 read with s 34 beyond reasonable doubt against both the accused.

[46] In *Hyam*, the female appellant had a relationship with a man who became engaged to be married to B. In the early hours of 15 July 1972, the appellant went to B's house and poured petrol through the letter box, stuffed newspaper through and lit it. She gave B no warning but went home leaving the house burning. B escaped from the house but her two daughters were suffocated by the fumes of the fire. The appellant was charged with their murder. Her defence was that she had set fire to the house only in order to frighten B so that she would leave the neighbourhood. The appellant was convicted of murder and her appeal against conviction was dismissed by the Court of Appeal. The appellant's further appeal to the House of Lords was also dismissed. The majority (3–2) held that a person who, without intending to endanger life, did an act knowing that it was probable that grievous, in the sense of serious, bodily harm would result was guilty of murder if death resulted.

[47] In the circumstances, we answer the above question in the affirmative.

CONCLUSION

[48] On the foregoing grounds, the accused's appeal, being without merits, was dismissed. We affirmed the whole of the decision of the High Court.

Appeal dismissed.

Reported by Ashgar Ali Ali Mohamed